III. THE NET IMPRESSION CONVEYED BY THIS MARKETING WAS NOT UNTRUE.

Having concluded — wrongly — that the net impression conveyed by Ameritech Illinois' marketing of SimpliFive was savings, the Proposed Order then assesses whether it was untrue. (HEPO, pp. 26-31). In concluding that it was, in fact, misleading, the Proposed Order relies on the fact that not every customer who received these materials would, in fact, save money under SimpliFive. (HEPO, p. 30). The Proposed Order's conclusions are flawed and must be modified.

First, as discussed previously, the Proposed Order adopts the wrong structure for its analysis by assuming that the "net impression" created by the SimpliFive marketing materials was savings. The primary message communicated to the vast majority of customers to whom SimpliFive was promoted was simplicity. The message to the much smaller universe of Winback customers combined the simplicity message with the potential for cost savings.

There is no dispute in the record that SimpliFive is, in fact, a simpler rate plan than Ameritech Illinois' basic rates. The Proposed Order does not contend otherwise. To the extent that the primary message and "net impression" were simplicity, they were not untrue. Even with respect to the Winback letters, simplicity was a significant component of the message.

Second, even if some of these materials did promote the potential for savings, they were not untrue. As the Company explained, the bill inserts were sent only to those customers with usage patterns appropriate for SimpliFive. (Am. Ill. Ex. 1.0, pp. 21-22).[4] The Proposed Order

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[4] With respect to winback customers, the Company's data demonstrates that they have calling patterns similar to customers to whom SimpliFive was marketed by bill insert. (Am. Ill. Ex. 1.0, p. 30).

attaches no significance to this fact, because the target market included both customers who would save money and those who could pay up to $3 more, based on the monthly billing used to develop the target market. (HEPO, p. 30, fn. 29), However, the Company testified that a ± $3 range was selected, in part, because customer usage varies from month to month; a customer paying $3 more in the sample month could well pay less in other months and less overall under SimpliFive. (Am Ex. 1.0, p. 21). Since SimpliFive could offer any of these customers savings, representations to that effect in the promotional materials were accurate.

Furthermore, the Company's market research had demonstrated that as many as one-third of its customers would pay more to obtain a simpler rate structure. Since simplicity was the primary objective of this plan, the Company reasonably established a target range that would include these customers who valued it. (Ibid.) Any customer who wanted a bill comparison could obtain one simply by calling a service representative. (Am. Ill. Ex. 1.0, p. 22).

Third, the Proposed Order relies on the wrong data — i.e., CUB's analysis of the impact of SimpliFive on the "typical" customer — to determine whether SimpliFive was marketed improperly. (HEPO, p. 29). SimpliFive was not marketed to Ameritech Illinois' entire customer base (which would be represented by the "typical" customer) or to some group of customers who had "typical" usage patterns. (Am Ill. Ex. 1.0, pp. 18-19). It was marketed primarily to those customers whose monthly billing would not be significantly affected by SimpliFive and who might prefer a simpler rate plan. Therefore, although CUB's analysis does assess the "likely charges that basic rate customers [in general] would experience by switching" to SimpliFive, it says nothing about the likely charges that basic rate customers who were the subject of those marketing campaigns would experience by switching to SimpliFive. By virtue of Ameritech

Illinois' target marketing, those customers would have either saved money or paid a slight amount more in exchange for simpler rates.

The Proposed Order misunderstands the purpose of the Company's analysis of the usage charges actually incurred by customers on SimpliFive. (HEPO, p. 29). These are the customers to whom SimpliFive was, in fact, marketed or who otherwise requested to be on this rate plan. They are far more representative of the customers who received SimpliFive marketing materials than the "typical" customer. This analysis, moreover, shows that customers selecting SimpliFive have, in fact, made choices that are consistent with the marketing objectives of and the benefits offered by this rate plan. Over half of SimpliFive customers pay less than under basic rates and three quarters either save money or pay no more than $3 per month over basic rates. (Am. Ill. Ex. 1.0, p. 32).

It would be unreasonable for the Commission to demand more precision than this. Customer decision-making in the real world does not always follow strict economic models. The Company is confident that if similar data were produced by the IXCs for their optional calling plans and their basic rates, the Commission would find that a substantial number of IXC customers are on the wrong plan — i.e., there would be many basic rate customers who would be better off on an optional calling plan and many optional calling plan customers who would be better off on basic rates. To Ameritech Illinois' knowledge, no regulator has held an IXC accountable for the vagaries of customer decisions, as long as carriers accurately describe the plans which are being offered.

Nothing in the FCC/FTC Policy Statement on telecommunications advertising — which the Proposed Order approves as providing "clear, comprehensive and sound" principles —

requires carriers to promote their services only to those customers who will benefit financially.[5] (HEPO, p. 12). The fundamental principle advanced in the Policy Statement is that there must be full disclosure of information material to the service being advertised or promoted. For example, price representations must be accurate and must conspicuously disclose any additional fees and charges (¶¶ 13, 20-21); time and geographic restrictions on the advertised rates must be disclosed (¶¶ 14, 15); and direct comparisons of advertised prices to competitors' prices must be current and accurate (¶ 17). No one in this proceeding has suggested that Ameritech Illinois failed to meet any of these requirements in its marketing of SimpliFive.

Similarly, nothing in the FCC/FTC Policy Statement imposes an obligation on carriers to compare the advertised rate plan to other rate plans they offer or warn customers that their usage patterns will impact whether they achieve savings. The Policy Statement does not suggest that advertising will be deemed "misleading" if customers can or do make the wrong decision.

The mere fact that some customers pay more under SimpliFive than under basic rates (and a few pay substantially more) does not support an inference that they were misled by the Company's marketing materials. There are any number of benign explanations for these results:

- Some customers value simplicity very highly and may be willing to pay substantially more for it;

- Customer usage patterns vary from month to month. Customers who paid more in the sampled month may pay less in other months, resulting in savings on an annual basis;

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[5] It is common knowledge that IXCs often use mass market channels such as television and radio spots to promote their calling plans. By definition, mass market channels reach customers who will not benefit from the plans.

- Customer usage patterns vary over time as their life circumstances change (e.g. teenagers leave for college, family members move), such that a plan that was right for them when first selected may later become inappropriate. Customers' failure to adapt their calling plan choices to their new circumstances may simply result from inattention.

- Customers may make mistakes, but are indifferent to the modest additional costs.

(Am. Ill. Ex. 1.0, pp. 57-58; Am. Ill. Ex. 2.0, p. 6).

Given the wide range of possible explanatory factors, the Commission cannot make any judgment, based on this data, as to whether customers were, in fact, misled by the Company's marketing practices.[6]

In sum, Ameritech Illinois did not mislead customers in its marketing of SimpliFive and the Proposed Order's conclusions to the contrary do not fairly reflect the record evidence.

IV. THE MARKETING OF SIMPLIFIVE WAS NOT ANTICOMPETITIVE

The Proposed Order contends that the marketing of SimpliFive was anticompetitive, because Ameritech Illinois failed to inform customers that most local (i.e., Bands A and B) calls would be more expensive under SimpliFive than under basic rates. (HEPO, p. 32). Since

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[6] Ameritech Illinois is troubled by the fact that the Proposed Order relies on initial difficulties in the roll-out of SimpliFive to indict the Company's entire marketing effort to date. (HEPO, p. 30). The Company forthrightly volunteered this information. (Am. Ill. Ex. 1.0, pp. 19-20). More importantly, the Company explained in detail the steps it took to ensure that these problems would not recur in the future. The Company (1) targeted all future SimpliFive promotions to customers whose bills would not be significantly impacted by the plan; (2) immediately developed a "calculator" tool, so that service representatives could provide interested customers with individual bill comparisons; and (3) took proactive steps to return customers who had made a bad decision when the product was first rolled out back to a more appropriate plan; and (4) issued adjustments on customers' bills . (Am. Ill. Ex. 1.0, pp. 20-21). This represents responsible behavior which should be commended — not criticized — if the Commission expects companies to proactively fix problems that arise and volunteer that information to the Commission.

Ameritech Illinois does not believe that the record supports a finding that its marketing practices were misleading in the first place, it also does not believe that a finding of competitive harm can be sustained.

The specific issue identified in the Proposed Order — i.e., that Ameritech Illinois did not disclose to customers that Bands A and B calling rates could be higher under SimpliFive than under basic rates — does not support a finding of competitive harm. CUB's argument was that customers would be led to believe that Bands A and B usage rates would be lower under SimpliFive. (CUB Ex. 1.0, pp. 14-15). In fact, Ameritech Illinois' marketing materials made no such representation. Furthermore, customers have to compare the overall benefits they obtain under SimpliFive with the overall benefits they obtain under the IXCs' optional calling plans, which include both local toll (Band C) and long distance service. (Am. Ill. Ex. 1.0, pp. 39-40).

The fact that Bands A and B rates today are higher under SimpliFive than under basic rates is an accident of history, not design. When SimpliFive was first offered, rates under both plans were substantially similar. (Am. Ill. Ex. 1.0, pp. 16-17). As a function of rate decreases required to comply with the price index component of the Alternative Regulation Plan, Bands A and B rates have declined. The SimpliFive rate for Bands A and B (5¢ a call and 5¢ a minute, respectively) could not be reduced commensurately without destroying the core attribute of the plan — i.e., simple pricing.

Perhaps more important, the Proposed Order recognizes that the record contains no evidence of any actual impact on competition. The Hearing Examiner brushes aside the lack of any evidence of competitive harm by finding that "actual harm to competition" is "unnecessary to a finding that utility practices are anticompetitive." (HEPO, p. 33). That finding is legally erroneous for a host of reasons.

First, it violates the Commission's duty to decide this case on the record. 220 ILCS 5/10-103. If there is no evidence of competitive harm—and there is not—the Commission can find none.

Second, the Proposed Order, in effect, seeks to create a substantive legal presumption regarding the competitive impact of utilities' conduct—one which appears nowhere in the Public Utilities Act. The creation of such a presumption is in the sole province of the General Assembly, which certainly knows how to do so when it wishes. E.g., 220 ILCS 5/13-514. The Commission is not the General Assembly, however, and its job is to enforce the law as written, not to rewrite the law to accommodate a perceived "mandate."

Third, there is nothing in Articles VIII or IX of the Public Utilities Act to suggest that Sections 8-501, 9-250 or 9-252, upon which the Proposed Order relies, were meant to address competitive issues. (HEPO, pp. 9-10). It is instructive that the Proposed Order relies on the MCI Telecommunications decision for the proposition that the Commission has the authority to address competitive harm. That decision was reversed on appeal, to the extent that it relied on Section 9-241. The Court found as follows:

> "Significantly, section 9-241 includes no mention of competition among utilities in general, or telecommunication carriers in particular. Nor does the language suggest any sort of prohibition related to a public utility's conduct vis a vis its competitors. Thus, we find that the interpretation now urged by the Commission and Complainants, that section 9-241 also prohibits anti-competitive conduct by telecommunications carriers conduct which discriminates against a carrier's non-customer competitors, is not warranted by the plain language of the statute." Illinois Bell Telephone Co. v. Commerce Comm'n, Ill. App. Nos. 1-96-2146 & 1-96-2166 (cons.), p. 13 (1997) (Attachment B).

The Court sustained the decision under Section 13-505.2, which does address carriers' conduct with respect to other carriers and competitors. Id.

The Court's reasoning is fully applicable here. Nothing in Sections 8-501, 9-250 or 9-252 mentions competition or competitors. This is hardly surprising, since those sections all

predate competition in Illinois' utility industries. Competitive issues are addressed in Section 13-514, but the Proposed Order properly found that claim to have been abandoned. (HEPO, p. 8). Having put that claim aside, the Proposed Order has no remaining legal grounds upon which it can address competitive issues.

V. INDUSTRY-WIDE MARKETING PRACTICES ARE RELEVANT

Throughout this proceeding, Ameritech Illinois has stressed that its marketing practices relative to optional calling plans are consistent with, and in most respects superior to, those of major carriers like AT&T and MCI. (Am. Ill. Ex. 1.0, pp. 41-46). The long distance companies offer a wide array of optional calling plans to consumers, with different rate structures, different time of day and different geographic restrictions. Many plans today require minimum recurring payments as high as $5.95 per month in order to qualify for low per-minute rates. (Am. Ill. Ex. 1.0, pp. 42-44).

The representative IXC customer letters which Ameritech Illinois supplied for the record make rate claims which, under the Proposed Order's standards, would convey a "net impression" of savings:

- "Sign up for AT&T One Rate® Plus 5¢ Weekends and call all weekend long for just 5¢ a minute...And Monday through Friday, you'll enjoy a simple low rate of just 10¢ a minute...All for a low $4.95 monthly fee. No restrictions. No spending minimums." (AT&T letter entitled "Lacking Something?").

- "With the AT&T One Rate® 7¢ Plan, you'll pay only 7¢ a minute, 24 hours a day, 7 days a week for all (emphasis in original) your state-to-state long distance calls from home...Best of all, you can enjoy this 7¢ rate for a monthly fee of just $5.95". (AT&T letter dated November 5, 1999).

- "Get MCI 5¢ Everyday Plus from MCI WorldCom. It's just 5¢ a minute weeknights and all weekend long and 7¢ a minute at all other times". The only reference to monthly recurring charges appears in tiny print in a footnote: "MCI 5¢ Everyday Plus has a $4.95 monthly fee". (MCI letter entitled "Activate your $25 Blockbuster Giftcard® Today").
(Am. Ill. Ex. 1.0, Schedule 2, emphasis added).[7]

Although these letters promote the IXCs' low per-minute rates, in fact, customers must make a substantial number of long distance calls to break even on the monthly recurring charge. Customers with moderate to heavy long distance calling benefit from these plans; customers with lower calling volumes will pay more under a calling plan than under the IXCs' basic rates. (Am. Ill. Ex. 1.0, pp. 7, 43-44).

The IXCs do not provide their customers with even the same level of information which Ameritech Illinois provides its customers today. Although intrastate long-distance is included in all three plans, no rate information whatsoever is provided.[8] (Tr. 47-48, 56). With respect to local toll service (Band C), according to the attached letters, AT&T's 5¢ plan automatically switches the customers' traffic to AT&T; AT&T's 7¢ plan makes it optional; and the MCI plan says nothing one way or the other. (Tr. 56-57). No information is provided on the applicable local toll rates. These omissions are significant, because both the universe of services which are subject to these plans and all of their prices are certainly material terms and conditions.

These IXC letters would never withstand scrutiny under the even higher standards set forth in the Proposed Order. The IXCs do not advise customers that the benefits of the plans being promoted (if any) depend on the customers' calling patterns. They do not provide

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[7] The fact that these promotions do not use the word "savings" explicitly is not material. That is clearly the message which the IXCs intend to convey.

[8] Review of "A Bell Tolls" rate information suggests that AT&T's and MCI's intrastate long distance rates under these plans are substantially higher than the 7¢ and 5¢ interstate rates being promoted. (Am. Ill. Ex. 1.0, Schedule 1, pp. 3-5).

customers with information on the relative advantages or disadvantages of alternative rate plans. Moreover, the IXCs cannot provide customers with individualized bill comparisons, even if asked. (Am. Ill. Ex. 1.0, pp. 45-46).

Ameritech Illinois recognizes that CUB filed this complaint against Ameritech Illinois alone. (HEPO, p. 33). However, the above IXC materials make clear that the Company is operating well within industry standards. The kinds of promotions which are described above are common in the industry. If additional consumer information were required to avoid deceptive or misleading marketing practices, surely the FFC/FTC Policy Statement would have addressed this issue.

The Company does not dispute that legal and regulatory marketing standards evolve over time and what may be accepted practice today could be considered misleading tomorrow. If the bar is going to be raised, however, it should be raised for all competitors at the same time. It would be fundamentally unfair for this Commission to tarnish Ameritech Illinois' reputation by adopting an order that will almost certainly result in newspaper headlines charging that the Company has engaged in deceptive marketing practices when it has done nothing out of the ordinary and, prior to this proceeding, nothing which was considered improper.

VI. THE REMEDIES IMPOSED BY THE PROPOSED ORDER ARE EXCESSIVE

Having found — wrongly — that Ameritech Illinois' marketing practices relative to SimpliFive have been unreasonable, the Proposed Order imposed a number of remedial requirements on Ameritech Illinois. Some of these obligations Ameritech Illinois agreed to during the proceeding and the Company obviously has no objection to their implementation.

The remainder, however, are excessively harsh and, in some instances, cannot be implemented at all. In the event that the Commission concludes that remedies are required, they should be carefully tailored to address the problem which has been identified. In addition, even if the Commission limits its decision to Ameritech Illinois, any remedies should be capable of extension to the rest of the industry.

A. Cessation of Misleading Practices

The Proposed Order imposes the following two requirements on the Company with respect to its marketing of SimpliFive:

- Ameritech Illinois is prohibited from conveying the net impression that a customer subscribing to SimpliFive will incur lower charges for Bands A, B, and C calling than under their present rate plan. An exception applies if that customer's usage charges for the prior three months would, in fact, have been lower;

- Ameritech Illinois may convey the net impression of cost savings as long as that impression is accompanied by an advisory statement that savings "are dependent on the customer's actual usage and are not guaranteed". This explanation must be prominently displayed, without distraction, as the most prominent element in the message of cost savings.
(HEPO, p. 37).

The first requirement is overbroad and conflicts with standards otherwise established in the Proposed Order. In determining whether the SimpliFive written materials were misleading, the Proposed Order states that it was not legally necessary for SimpliFive to save all customers money; rather, the materials were deemed misleading because a "significant percentage" of the customers to whom SimpliFive was marketed was not likely to save money. (HEPO, p. 30).

Under this standard, Ameritech Illinois should be allowed to target its marketing to a group somewhat larger than those who would save money, without including the advisory language, as long as the "non-qualifying" customers are not a "significant percentage" of the group. The remedial restriction should be modified accordingly.

Ameritech Illinois assumes that the advisory language is not required in SimpliFive marketing materials (or those for any other product or service), as long as they do not convey a "net impression" of cost savings. For example, Ameritech Illinois would be free to market SimpliFive broadly to customers if its only message were simplicity. The Company seeks assurance, however, that the provision of price information in materials that promote simplicity will not be considered a promise of savings. Otherwise, the savings advisory will de facto be required in every SimpliFive promotion, regardless of the message. This result clearly was not intended.

Where an advisory is mandatory, moreover, the Proposed Order imposes unreasonable requirements regarding size and placement. Under the Order, the advisory must be the "most prominent element in the message". (HEPO, p. 37). Putting customers on notice is one thing; requiring the typeface for that notice to be bigger and more noticeable than anything else is something else. According to the FCC/FTC Policy Statement, the FTC does not require mandatory disclosures to be identical in size to the advertising text, much less bigger; for example, disclosures in typeface half the size of the text are permissible, as long as they are in reasonably close proximity. FCC/FTC Policy Statement, supra, pp. 12-13, ¶29 (Example # 14). Since requiring such disclosure in the first place singles the Company out for unique treatment, at a minimum size and placement restrictions should be consistent with settled administrative practice.

Furthermore, "supersized" disclosures could themselves be misleading to customers. Ameritech Illinois is competing today against IXCs who have no obligation to include such advisories, and, in fact, do not include them when promoting optional calling plans to customers. If customers were to compare a promotion from Ameritech Illinois where the advisory dominates the message with a comparable promotion from an IXC which has no such advisory, customers may well conclude on that basis alone that the IXC's plan is better and will produce savings. The Company assumes that it is not the Commission's intention for the advisory itself to mislead customers as to the merits of competitive products or to disadvantage Ameritech Illinois in the marketplace. (Am. Ill. Ex. 1.1, pp. 4-7).

B. Affirmative Customer Information and Education Requirements

The Proposed Order also imposes the following affirmative customer information obligations on Ameritech Illinois' marketing of SimpliFive:

- In marketing SimpliFive, all service representatives must offer customers a billing comparison between SimpliFive and their current rate plan before customers may subscribe to this plan.

- This offer must be made by both in-house service representatives and outside telemarketers who make "winback" contacts. The only exception is for winback customers who have been "slammed and who were SimpliFive subscribers prior to being slammed.

- All prospective SimpliFive customers must be given a further opportunity to receive the billing comparison in writing.
(HEPO, pp. 37-39).

Ameritech Illinois assumes that this requirement for bill comparisons does not apply where the promotion does not convey a net impression of savings, consistent with the Proposed Order's treatment of the need for advisories. This proceeding was initiated by CUB premised on allegations of deceptive marketing. If Ameritech Illinois' promotions are not, in fact, misleading, then there are no legal grounds to impose any remedies.

Where the promotion does convey a net impression of savings, mandatory bill comparisons are still cumulative of the prior disclosure requirements. For example, if, in fact, Ameritech Illinois targets a promotional campaign for SimpliFive based on savings to an appropriate sub-group of customers who can be expected to save money based on historical bill analyses, a requirement that these customers also be provided with individualized bill comparisons is unnecessary. In that circumstance, customers should be permitted to sign up for SimpliFive simply by filling out an order request or calling a voice response unit.

Even where a campaign is premised on savings and has not been targeted, customers will still have been placed on notice by the advisory that they need to assess the benefits of the plan in light of their own calling patterns. Consistent with commercial expectations in this and other industries, it is the customer's obligation to obtain information about the benefits of any product or service in the first instance. Accordingly, it should be the customer's decision whether or not to ask for a billing comparison. (Am. Ill. Ex. 1.0, p. 49).

The Proposed Order's requirement that both Ameritech Illinois' in-house service representatives and outside telemarketers provide customers with billing comparisons is new and raises privacy and security issues which have not been addressed.[9] Although the Proposed Order notes that outside telemarketers do not have access to the "calculator" tool today, it does

not explain why. (HEPO, p. 38). In order to use the "calculator", a telemarketer would have to have complete access to the Company's customer billing records. Ameritech Illinois maintains stringent control over access to these records in the normal course of business to protect customer privacy. In the Company's view, it is risky to allow outside contractors — who are hired and fired by third parties and who are not subject to Ameritech Illinois' internal disciplinary and other controls — access to them. (Am. Ill. Ex. 1.0, p. 28). These security issues simply were not explored at length in this proceeding. Under these circumstances, the Commission should not overrule the Company's judgment that telemarketer access to customer records is inappropriate.

A mandatory bill comparison is also potentially unworkable in many winback situations. In order to conduct a billing comparison, historical usage records must be available for that customer. The Company does not retain billing records for customers who switch to another carrier indefinitely. Even in-house service representatives would not have access to historic Band C usage history for winback customers for more than a few months. It makes no sense to prohibit Ameritech Illinois from offering SimpliFive to a winback customer and to prohibit that customer from subscribing to SimpliFive — no matter how intensely the customer wants the service — just because billing records are no longer available. At some point, customers should be allowed to make their own decisions, even if the preferred level of information is not available.

The requirement that Ameritech Illinois also provide customers with this bill comparison in writing is totally unwarranted on the basis of this record. With the availability of verbal bill

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[9] Today, when customers contacted by an outside telemarketer request a billing comparison, they are referred to in-house service representatives. (Am. Ill. Ex. 1.0, pp. 28-29).

comparisons, Ameritech Illinois' customer information substantially exceeds that of other carriers operating in its service territory. Imposing a further obligation to offer that comparison in writing is simply overkill. There is no evidence that customers even want this data. (Am. Ill. Ex. 1.1, p. 11-12). Although "perfect information" is a laudable goal in any marketplace, such a goal must be tempered by practical realities and a reasonableness test.

The Proposed Order dismisses out of hand the fact that Ameritech Illinois' systems are not designed to generate written documents and would require "significant, systematic and costly changes" to produce such documents. (HEPO, pp. 38-39, citing Am. Ill. Ex. 1.1, p. 11). These concerns cannot be so easily disregarded. The fact that system changes would be required was not challenged by any party to the proceeding. The Proposed Order merely asserts that "written estimates are a customary commercial instrument". (HEPO, p. 39). Whatever merit this statement may have in other industries, the record demonstrates that the provision of verbal individualized billing comparisons is virtually unheard of in this marketplace, much less the provision of written comparisons. (Am. Ill. Ex. 1.0, pp. 45-46).[10]

The Company further notes that, unlike purchasing decisions for some other products and services, the decision to take service under an optional calling plan is not irreversible. Customers today already receive information in writing which allows them to determine

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[10] In a footnote, the Proposed Order suggests that an on-line service called "A Bell Tolls" urges customers to obtain offers for telecommunications service in writing before signing up. (HEPO, p. 39, fn. 35). This statement is directed at on-line offers and, furthermore, has nothing to do with individualized bill comparisons between alternative rate plans. "A Bell Tolls" is simply warning customers to get a written confirmation from the carrier to ensure that the service in question will be offered by that carrier at the rates being quoted and that the customer is aware of all relevant charges and conditions. The complete text associated with this recommendation is as follows: "A Bell Tolls™ is a directory service. No attempt is made to verify information on linked pages. A Bell Tolls recommends that consumers request, obtain and review online offers in writing before making any monetary commitment. Read the little letters at the bottom of each page; the import of the words is inversely proportional to their size". (Am. Ill. Ex. 1.0, Schedule 1, p. 4, emphasis added). No one in this proceeding has suggested that Ameritech Illinois misquotes its prices or fails to provide service at the prices contained in its marketing materials. The same cannot be said for all toll providers.

precisely what the impact of a calling plan is on what they pay for service — i.e., their monthly telephone bill. These plans have no termination liabilities or other charges that are imposed when customers cancel them. Furthermore, Ameritech Illinois has a liberal bill adjustment policy in situations where a customer selects a calling plan and then, based on actual billing, decides that it was not the right decision. (Am. Ill. Ex. 1.1, p. 12; Am. Ill. Ex. 1.0, p.20). Thus, excessively burdensome "pre-sale" disclosure requirements are simply unwarranted.

Finally, it would be unwise as a matter of policy to impose a burdensome disclosure obligation on Ameritech Illinois where there is a substantial likelihood that it could not be imposed on its competitors. Whether or not the Commission chooses to address marketing standards in a rulemaking proceeding at this juncture, Staff and CUB generally agree that all carriers in the marketplace should be held to comparable standards of truthfulness. (Staff Ex. 1.0, p. 20; Tr. 37-38). Whatever information customers "need" from Ameritech Illinois to make informed decisions, they also "need" from other carriers providing competing products and services. The Commission is already imposing obligations on Ameritech Illinois that its competitors probably cannot meet, just by imposing a mandatory obligation to provide oral bill comparisons. A further obligation to provide written bill comparisons exceeds the bounds of reasonableness.[11]

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[11] Admittedly, the IXCs did not participate in this proceeding. However, the fact that they do not offer customer-specific bill comparisons at all today strongly suggests that redesigns of their systems would be required to provide this capability even on a verbal basis, much less a written basis.

VII. THE FINDING THAT THE MARKETING OF SIMPLIFIVE VIOLATES THE CONSUMER FRAUD ACT IS CONTRARY TO CLEARLY SETTLED LAW AND IS NOT NECESSARY TO THE COMMISSION'S DECISION.

Although the Proposed Order correctly concludes that the Commission has no authority to enforce the Consumer Fraud Act—relying instead on its authority under the Public Utilities Act—it nonetheless goes on to propose a finding that "Ameritech's S5 marketing constitutes an 'unfair or deceptive practice,' within the meaning of Section 505/2 of the Consumer Fraud Act because it includes a false promise, misrepresentation . . . or omission of . . . material fact with the intent that others rely on the omission." (HEPO, pp. 30-31).

Regardless whether the Commission accepts any of Ameritech Illinois' other exceptions, that proposed finding should be deleted, for two reasons. First, it is contrary to settled law. It is well established that the filed rate doctrine precludes fraud, false advertising, and other deceptive practice claims, whenever such claims concern the rates, terms and conditions in a lawfully filed tariff. See, e.g., Marcus v. AT&T, 138 F.3d 46, 59-65 (2d Cir. 1998); Cahnmann v. Sprint Corp., 133 F.3d 484, 490-91 (7th Cir. 1998); Sun City Taxpayers Ass'n v. Citizens Utils. Co., 45 F.3d 58, 62 (2d Cir. 1995); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2nd Cir. 1994); Taffet v. Southern Co., 967 F.2d 1483, 1494-95 (11th Cir. 1992) (en banc); H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 491-92 (8th Cir. 1992); Marco Supply Co. v. AT&T Comms., Inc., 875 F.2d 434, 436 (4th Cir. 1989) (per curiam). Claims under the Consumer Fraud Act have specifically been rejected. Cahnmann, 133 F.3d at 490-91. These decisions flow directly from a corollary to the filed rate doctrine: customers are conclusively presumed to be aware of the rates, terms and conditions contained in a carrier's tariffs. Thus, a customer may not pursue a claim

that he or she was misled regarding those rates, terms or conditions. Marcus, 138 F.3d at 64; see also Maislin Industries v. Primary Steel, Inc., 497 U.S. 116, 127-28 (1990); Fax Telecommunicaciones v. AT&T, 952 F.Supp. 946, 951 (S.D.N.Y. 1996); Fast Freight Lines, Inc. v. Howard Love Mach. Supply, Inc., 838 F. Supp. 308, 310 n.1 (E.D. Tex. 1993).

In Cahnmann, the plaintiffs brought suit in Illinois state court against Sprint alleging breach of contract and violations of the Consumer Fraud Act in connection with the marketing of Sprint's "Fridays Free" long-distance calling promotion. The complaint alleged, in essence, that Sprint broke its promises and misled consumers when it eliminated ten countries from the free Friday international calling that it had promoted. Sprint took the position that both the breach of contract and Consumer Fraud Act claims were barred by the filed rate doctrine. The District Court agreed and granted judgment on the pleadings in favor of Sprint. Cahnmann, 133 F.3d at 486-87. The Court of Appeals upheld the District Court's decision, holding that Sprint's filed tariffs precluded both causes of action, and that any complaints regarding Sprint's representation regarding the tariffs belonged before the FCC. Id. at 489-91.

In rejecting the plaintiff's claims under the Consumer Fraud Act, the Court of Appeals relied on the United States Supreme Court's decision in Maislin. There, the Supreme Court ruled that a carrier's filed tariffs provide customers with legally sufficient notice of a carrier's rates, regardless of what the customers are, or are not, told about the carrier's rates. Maislin, 497 U.S. at 120; see also Marcus, 138 F.3d at 58-59; Fast Freight, 838 F.Supp. at 310 n.1. Therefore the Court of Appeals ruled that the constructive notice provided by the tariffs precluded claims under the Consumer Fraud Act. Cahnmann, 133 F.3d at 490. Instead, the plaintiff's claims were tariff-related claims, properly addressed to the FCC.

The Second Circuit Court of Appeals rejected similar state law claims of common law fraud, misrepresentation, deceptive practices and false advertising in Marcus. As that Court explained, "Central to the filed rate doctrine is the 'presumed knowledge doctrine.' Under that doctrine, 'the [customer's] knowledge of the lawful rate is conclusively presumed.'" Marcus, 138 F.3d at 63, quoting Kansas City Southern Ry. v. Carl, 227 U.S. 639, 653 (1913). The customers' presumed knowledge of the prices, terms and conditions in the tariffs precludes the customer from being misled, at least in the sense necessary to pursue claims of fraud, false advertising and the like. Id. at 63-65;

This is true even with respect to statutory fraud claims which (like the Consumer Fraud Act) do not require actual reliance by the consumer. Such claims are barred because, consistent with the deceptive practice standard adopted in the HEPO, a statement can be legally deceptive or misleading only if it is "likely to mislead" a reasonable consumer. Indeed, the New York deceptive practices statute addressed in Marcus applied standard virtually identical to the one adopted in the Proposed Order. Compare id. at 64 with HEPO at 11 (quoting FTC/FCC Joint Policy Statement). The Marcus court held that a reasonable consumer could not legally be found to rely on claims that conflicted with the tariff; thus, it was impossible to maintain an action contending that statements concerning the tariffed rates were legally deceptive. Id. at 64. This is essentially the same holding as the Seventh Circuit reached in Cahnmann, 133 F.3d at 490.

Finally, the Marcus court held that both fraud and deceptive practice claims were barred because customers could not show that they had been harmed. As the Court ruled, affirming the District Court's decision, the plaintiffs "'have suffered no legally cognizable damages because they paid the tariff rate.'" Id. That ruling is also consistent with settled law. See, e.g., Sun City Taxpayers' Ass'n, 45 F.3d at 62; H.J. Inc., 954 F.2d at 494.

The only significant difference between the allegations in Cahnmann (or Marcus or any of the other cases cited above) and CUB's allegations here is that this case involves intrastate calling, and, therefore, belongs before the Commission rather than the FCC. Because the filed rate doctrine is equally a part of state law (220 ILCS 5/9-240), the result must also be the same. Ameritech Illinois' filed tariffs preclude a claim under the Consumer Fraud Act, because they preclude a finding that customers are "likely to be misled" regarding those rates, at least in any way the law recognizes. They also preclude any customer who has paid a tariffed rate from showing any legally cognizable harm. See, e.g., Marcus, 138 F.3d at 63-65; Cahnmann, 138 F.3d at 490-91. Thus, the Proposed Order's finding that Ameritech Illinois has committed a deceptive practice "within the meaning of Section 505/2 of Consumer Fraud Act" is clearly erroneous.[12] (HEPO, pp. 30-31).

Second, and perhaps more important, the Proposed Order's finding is entirely unnecessary to the Commission's decision in this matter. In fact, the finding is likely to impede, rather than effectuate, the Commission's ability to resolve this Complaint and others like it. As the Court observed in Cahnmann, "From a systemic standpoint the federal [FCC] remedy is preferable, since class actions of thousands or perhaps even millions of telephone subscribers, litigated in state court under state laws, could disrupt the federal regulatory scheme." Cahnmann, 133 F.3d at 491. The same is true here. The Proposed Order's finding regarding the Consumer Fraud Act can only call into question the validity of its earlier, and clearly correct, finding the Commission has the authority to resolve the case under the Public Utilities Act. At

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[12] As the Court of Appeals made clear in Cahnmann, this does not leave consumers without a remedy. They can avail themselves of any relief available from the appropriate regulatory body (the FCC in Cahnmann, the Commission here). They simply do not have a claim under the Consumer Fraud Act. Cahnmann, 133 F.3d at 490-91.

the same time, it potentially invites a multiplicity of actions in other forums, which not only could undermine the Commission's authority, but also could place carriers at the risk of conflicting judgments.

For similar reasons, the Commission should delete the final paragraph of its discussion of damages on page 36 of the Proposed Order. That paragraph incorrectly implies that customers might bring an action for damages in the circuit courts. The implication of the Proposed Order is directly contrary to settled law. Appellate courts have universally held that trial courts may not award damages when customers alleging fraud have paid tariffed rates. See, e.g., Marcus, 138 F.3d at 59-64; Sun City Taxpayers' Ass'n, 45 F.3d at 62; H.J. Inc., 954 F.2d at 494. Indeed, the United States Supreme Court has made clear that the filed-rate doctrine bars all state law claims for damages, whenever the subject matter of the claims is addressed in a carrier's tariffs. American Telephone and Telegraph Co. v. Cental Office Telephone, Inc., 524 U.S. 214 (1998). Because Illinois law also incorporates the filed-rate doctrine (220 ILCS 5/9-240), those cases are fully applicable to CUB's claims (or any similar claims), and no damages can legally be awarded by the circuit court.

And, as is true of the language regarding the Consumer Fraud Act, the erroneous language is entirely unnecessary to the Commission's decision. It can only raise questions regarding the Commission's authority and encourage wasteful, duplicative and non-meritorious litigation. That language should therefore be deleted.

CONCLUSION

In view of the foregoing, the Commission should conclude that Ameritech Illinois' marketing of SimpliFive has not been unjust or unreasonable and that CUB's complaint should be dismissed. Even if the Commission concludes otherwise, the remedies should be more narrowly tailored based on the record evidence and the relevant policy considerations.

Respectfully submitted,

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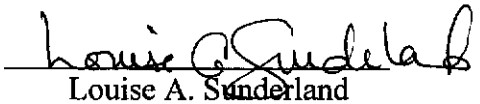
Dated: September 29, 2000

CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, hereby certify that copies of the foregoing Brief on Exceptions, and Exceptions of Ameritech Illinois to Hearing Examiner's Proposed Order were served upon the parties electronically and by express mail on September 29, 2000 from Chicago, Illinois.



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